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Supreme Court of the United States

OCTOBER TERM, 1951

No. 740

MORAN TOWING & TRANSPORTATION COMPANY, INC.,

Petitioner,

versus

EMPRESA HONDURENA de VAPORES, ETC., UNITED STATES OF AMERICA AND MOBILE TOWING AND WRECKING COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

SELIM B. LEMLE,
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LEMLE & KELLEHER,
McCORVEY, TURNER, ROGERS,
JOHNSTONE & ADAMS,
Of Counsel.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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EMPRESA HONDURENA de VAPORES, ETC., UNITED STATES OF AMERICA AND MOBILE TOWING AND WRECKING COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Moran Towing & Transportation Company, Inc., respectfully prays that a writ of certiorari issue out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on February 21, 1951, which modified and affirmed a decree of the United States District Court for the Southern District of Alabama, finding petitioner's vessel, the "Margot Moran", partially at fault for a collision and assessing damages against that vessel.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C., Section 1254 (1).

The opinion of the Court of Appeals for the Fifth Circuit was filed February 21, 1952. A petition for rehearing was denied on April 1, 1952. Upon motion of petitioner, an order was made by that Court staying the mandate until May 8, 1952, pending the filing of this petition for certiorari.

SUMMARY STATEMENT

This case involves a collision which occurred in the ship channel between Mobile, Alabama and the Gulf of Mexico.

"San Benito" left Mobile for sea under her own power. "Caloria", owned by the United States, was in tow of Moran Towing & Transportation Co., Inc.'s tug "Margot Moran" on a hawser proceeding up the ship channel towards Mobile and was being steered by Mobile Towing & Wrecking Company's tug "Ernest F Ladd", which was lashed to her after starboard quarter. As "San Benito" approached the Moran tug and its tow, a passing was agreed upon. The Moran tug and "San Benito" passed each other with fifty to one hundred and fifty feet of clearance, but "Caloria" failed to follow in the wake of the Moran tug and a collision ensued between "San Benito" and "Caloria" with severe damage to both.

Libels, cross-libels and petitions under the 56th Admiralty Rule were filed by the parties and the case proceeded to judgment on an interlocutory decree of liability.

THE DECISIONS BELOW

The District Court held (R. 545) that "San Benito" was at fault for proceeding at an excessive speed and for failing to reduce her speed when passing a tow in a narrow channel. The District Court further held the Moran tug and the "Caloria" guilty of fault because of the failure of the "Caloria" to steer in the wake of the Moran tug. "Ladd" was absolved from liability, and damages were assessed half against "San Benito" and the other half against the Moran tug and "Caloria" in the proportion of one-quarter to each.

Appeals and cross-appeals were taken, and the Court of Appeals for the Fifth Circuit modified the decree of the District Court to the extent that damages were assessed one-third each against "San Benito", "Caloria" and the Moran tug. The decision of the Court of Appeals is printed in the record (R.594).

QUESTIONS PRESENTED

1. May a Court of Appeals of the United States sitting in admiralty and required by law to hear a case *de novo* fail to determine the issues between the parties, and avoid the determination of the appeal by adopting the findings of the Trial Court while at the same time indicating that those findings are not supported by the record?

2. May a towing tug, against which no fault or negligence has been proven, be held liable for damages to its tow and to a vessel in collision with its tow solely because of the failure of the tow to steer in the wake of the tug?

3. May a Court of Appeals disregard the rule established by the Supreme Court to the effect that a tug

is not a bailee of her tow, and charge a towing tug with liability for a collision between her tow and another vessel in the absence of proof of fault?

REASONS FOR GRANTING WRIT

1. That an appeal in admiralty is a trial *de novo* requires no citation of authority. The Court of Appeals for the Fifth Circuit has recognized this rule of law in at least three recent cases: *The Portaritisa*, 131 F. 2d 362; *Wilbanks & Pierce Co., Inc. v. Hendry*, 150 F. 2d 214; and *The West Kyska*, 155 F. 2d 687.

In the instant case, the Court below found that it was not "in any doubt that the "San Benito" was guilty of fault contributing to cause the collision". It further found that "whether there was fault as between the "Moran" and the "Caloria", may not be so easily answered" by reason of the conflicts presented by the record.

Instead, however, of resolving those conflicts, the Court below deliberately refused to determine fault from its own analysis of the record, and, although apparently not concurring in the findings of the District Judge, nevertheless adopted those findings as determinative of the issues. Such conduct, it is submitted, deprives petitioner of its right to have its cause heard *de novo* on appeal, and violates the spirit of the rule heretofore recognized by the Court of Appeals for the Fifth Circuit and unanimously followed in admiralty causes throughout the country.

2. The decision of the Court below strikes at the roots of a long standing admiralty doctrine and establishes in the Fifth Circuit a rule of law in conflict with that applicable in the Second and Sixth Circuits.

In those Circuits, the rule has been established that where a tug with a vessel in tow on a hawser effects a safe passage with an approaching ship, the tug may not be charged with fault if a collision results because of the tow's failure to steer in the wake of the tug: *The Willowpool*, 65 F. 2d 385; *The John A. Hughes*, 184 F. 308; *The Alfred W. Booth*, 135 F. 519; *The Yuma*, 132 F. 964; *The George Presley*, 111 F. 555.

3. Since the decision of your Honors in *Stevens v. The White City*, 285 U.S. 195, holding that towage is not a bailment, no tug has been held liable to its tow in the absence of an express and specific finding of fault on the part of the tug. Despite the foregoing rule, which has been followed in the Fifth Circuit in *New Orleans Coal & Bisso Towboat Co. v. United States*, 86 F. 2d 53 and in *The Lapwing*, 150 F. 2d 214, the Court below charged the Moran tug with liability without a finding of fault.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court, for its review and determination, a full and complete transcript of the record below; that the decision of the said Court of Appeals be reversed; and that petitioner have such other and further relief as justice may require.

/s/ SELIM B. LEMLE
Counsel for Petitioner.

LEMLE & KELLEHER,
McCORVEY, TURNER, ROGERS,
JOHNSTONE & ADAMS,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1951

No. _____

BRIEF IN SUPPORT OF PETITION.

May It Please the Court:

POINT NO. 1

> **"May a Court of Appeals of the United States sitting in Admiralty and required by law to hear a case *de novo* fail to determine the issues between the parties, and avoid the determination of the appeal by adopting the findings of the Trial Court while at the same time indicating that those findings are not supported by the record?"**

Since the case of *Munson S. S. Line vs. Miramar S. S. Company*, 167 Fed. 960 decided by the Second Circuit in 1909 it has been established that an appeal in admiralty from a district court opens the whole case for trial *de novo* in the Appellate Court. This proposition hardly requires citation of authority. The failure of the Court of Appeals for the Fifth Circuit to determine the issues presented by the appeal is directly contrary to their repeated and uniform holdings in *The Portaritisa*, 131 F. 2d 362; *Wilbanks and Pierce Inc. vs. Hendry*, 150 F. 2d 214 and *The West Kyska*, 155 F. 2d 687, where the court said:

> "An appeal in admiralty is a trial *de novo*, and the findings of fact made by the court below

are not binding on this court. Since the court below took no oral testimony and took all testimony in depositions, no opportunity was afforded the lower court to see and hear the witnesses; hence we have no reason to give weight to the lower court's findings of fact."

POINT NO. 2

"May a towing tug, against which no fault or negligence has been proven, be held liable for damages to its tow and to a vessel in collision with its tow solely because of the failure of the tow to steer in the wake of the tug?"

The District Judge found (R. 554) that when the "San Benito" and the Tug "Margot Moran" passed each other there was a clearance of at least 50 to 150 feet and possibly 150 to 200 feet between them. There is, therefore, presented the case of a tug with its tow on a hawser meeting and effecting a safe and proper passage with an approaching vessel, but its tow failing to steer in the wake of the tug, resulting in a collision with the approaching vessel.

In this case the "Caloria" was manned by a riding crew, her navigation was being directed by a local pilot who was a member of the Mobile Bar Pilot's Association, and there was lashed up alongside her a 1200 h.p. harbor tug, the "Ernest F. Ladd", for the purpose of steering the "Caloria". This riding crew, the pilot and the Tug "Ernest F. Ladd" were all employed and paid by the United States, not Moran Towing and Transportation Company, Inc.

The respective roles which the Tug "Margot Moran" and "Ernest F. Ladd" were playing in this towage is clear and indisputable. All of the testimony,

without exception, is to the effect the Tug "Margot Moran" was furnishing the pulling power and the Tug "Ernest F. Ladd" was lashed up to the "Caloria" for the purpose of and was actually steering the "Caloria" under the direction and orders of the "Caloria's" master and of her pilot. Accordingly, whatever may be the reason why the "Caloria" did not follow in the wake of the Tug "Margot Moran", and whether it be the fault of the "Caloria" for failure to give proper steering orders or the fault of the "Ernest F. Ladd" for failure to execute those steering orders, or the fault of both, that fault is not attributable to the "Margot Moran". In no event could it have been the fault of the "Margot Moran" because Captain Bijelich, the "Caloria's" master, has testified unequivocally (R. 310) that the "Margot Moran" could not have done anything to have avoided the collision and could not have steered or gone closer to the easterly bank of the channel.

There is no applicable prior jurisprudence in the Fifth Circuit. Probably the reason is that in this part of the country most of the towage is of unmanned barges which have no steering gear. However, elsewhere, particularly on the eastern seaboard, an entirely different situation exists; there many of the tows, even barges, are manned and have steering gears. There the jurisprudence is well established and unanimous, and in the interest of unanimity in the universal admiralty jurisprudence of this Country, we respectfully submit that in this case the already well established doctrine which prevails in the Second and Sixth Circuits should be followed.

For your Honors' ready reference, we review here briefly the jurisprudence of the Second Circuit and of the Sixth Circuit which, we reiterate, is unanimously to

the effect that under these circumstances the towing tug is to be exonerated and its tow held solely at fault.

In *The Willowpool* (2 C.C.A.) 65 F. 2d 385, it appears that the Tug "Julia C. Moran" had in tow astern on a hawser the Steamship "West Wauneke", which was a dead ship but manned by a small crew, who were steering with hand gear. The case therefore is not as strong for the towing tug as here, where the "Caloria" was being steered by a large and powerful steam tug. In any event the "Julia C. Moran" undertook with her tow to pass the anchored steamer "Willowpool". The "Julia C. Moran" safely passed the "Willowpool" but the "West Wauneke" suddenly took a sheer and collided with it. On behalf of the "Willowpool" a libel was filed against the Moran Towing & Transportation Company, Inc., the owner of the Tug "Julia C. Moran", which impleaded the tug's tow, the "West Wauneke". On behalf of the "West Wauneke" a libel was also filed against the "Julia C. Moran" and Moran Towing & Transportation Company, Inc., for damage to the "West Wauneke" and in the matter the Steamship "Willowpool" was impleaded. The causes were consolidated and from a decree against the "Julia C. Moran" and Moran Towing and Transportation Company, Inc., the latter appealed. The Court of Appeals exonerated the Tug "Julia C. Moran" and Moran Towing & Transportation Company, Inc. and held that the Steamship WEST WAUNEKE was obligated to follow in the wake of her tug and that the collision was brought about by her failure to do so, saying (65 F. 2d 386):

> "As she was being towed, it was the duty of the WEST WAUNEKE, to follow in the wake of the tug, and her failure resulted in the collision. There is no proof that the tug caused the sheer.

> A tug is not the insurer of the safety of a vessel in tow. An action against a towing tug is one in tort and not for breach of contract. *Stevens v. The White City*, 285 U.S. 195, 52 S. Ct. 347; 76 L. Ed. 699. The burden is upon the tow to prove the negligence of the tug. In the absence of such proof, a tow which collides with an anchored vessel is blameworthy. *The Margaret*, 95 U.S. 494, 24 L. Ed. 146; *The Jacob Brandow* (D.C.) 39 F. 831."
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> * * * * *
>
> "There was no reasonable theory upon which fault might be charged to the appellant. The burden was upon the appellee to show some fault in towing, and in this it failed. It was the steering of the steamship, in charge of its boatswain, which was the immediate cause, as the evidence establishes."

In *The John A. Hughes* (2 C.C.A.) 184 F. 308, it appears that a collision occurred in a dense fog, between a barge in tow of the Tug "John A. Hughes" east bound, and a barge in tow of the Tug "Scranton" west bound. The two tugs were each towing on a hawser astern and the barges had no motive power of their own, but they were manned barges, equipped with steering gears. The two tugs, after an exchange of passing signals, passed each other in safety, but the wheelsman on Barge "Powell' starboarded instead of porting his wheel with the result that the collision occurred. The owner of the Barge "Powell" libeled both of the tugs, alleging fault for navigating in a fog and other faults, but the court exonerated both tugs, saying that by good luck or good management the tugs had ascertained their relative positions in the fog and agreed upon courses of navigation which would have carried them and their tows clear of each other, but for the "Powell's" error

in steering, and that this error in steering was the independent cause of the collision without which it would not have occurred, because it was the duty of the tow to follow its towing tug.

In *The Alfred W. Booth* (2 C.C.A.) 135 F. 519, the Court of Appeals affirmed on the opinion of the district court for the Southern District of New York (123 F. 172), in a case involving a collision between the first of two tows on a long hawser and an anchored scow. The Tug "Alfred W. Booth", a Moran tug, came in from sea with a dump barge known as No. 3 in tow on a long hawser, and passed 300 feet in the clear of the anchored vessel, but the No. 3 collided with it. The anchored vessel libelled the Tug "Booth" alleging that she was at fault for bringing her tow into a collision with the anchored vessel. Moran, owner of the Tug "Booth", filed a petition and brought in its tow, the No. 3, claiming that the collision occurred because the No. 3's steering gear was out of order and that it did not follow the "Booth", which caused the collision. The Court exonerated the Tug "Booth" but held the tow, the No. 3, liable for failure to follow its towing tug.

The Yuma (2 C.C.A.) 132 F. 964, arose out of a collision between the Steamer "Yuma" and the two masted schooner "John Martin", which was in tow of the Steamer "Maurice G. Grover", as a result of which the "Yuma" was damaged and the "Martin" was sunk. The "Martin's" owner libelled the "Yuma" to recover its collision damages and on the part of the "Yuma" a cross-libel was filed against the "Grover" which had the "Martin" in tow. The District Court (D.C. (W.D. N.Y.) 117 F. 894 exonerated the "Grover" and held the Schooner "Martin" and Steamer "Yuma" at fault. The

Second Circuit Court of Appeals affirmed and exonerated the towing tug, the "Grover", notwithstanding the fact that she was navigating in a portion of the river contrary to an order issued by the War Department, holding that that was not the cause of the collision, but it was caused because the Schooner "Martin", in tow of the "Grover", did not follow her tug, but sheered toward and collided with the steamer, and that the steamer was liable for failing to stay clear of the sheering schooner, notwithstanding the fact that there was room to do so.

In *The George Presley* (6 C.C.A.) 111 F. 555, the Tug "George Presley" was bound down the St. Clair River with three vessels in tow, one of them the Schooner "Helvetia". The length of the entire tow was approximately 2500 feet, the tow line from the "Presley" to the first vessel was about 400 to 500 feet and the tow lines between the first and second and the second and third vessels from 200 to 300 feet each. The "Presley" had anchored in the river with her tow behind her downstream. When she got under way again to head down the river she had to come about and her tow had to come about and follow her. The "Presley" came about successfully but the "Helvetia" did not follow the "Presley" but collided with the "S. S. Yakima", which was bound up the river. In the ensuing litigation the court exonerated the towing tug "Presley" but held the "Helvetia" at fault for not following her towing tug, and the "Yakima" for not staying clear of the "Helvetia". While the damages were divided between the "Helvetia" and the "Yakima", as stated, the towing tug "Presley" was wholly exonerated.

The failure of the Court of Appeals for the Fifth Circuit to exonerate the "Margot Moran" in this case

constitutes a departure from the unanimous admiralty rule established by the jurisprudence of the Second and Sixth Circuits and is in conflict therewith.

POINT NO. 3

> "May a Court of Appeals disregard the rule established by the Supreme Court to the effect that a tug is not a bailee of her tow, and charge a towing tug with liability for a collision between her tow and another vessel in the absence of proof of fault?"

This litigation involves not only the claim of the "San Benito" for its damages but also a claim by the United States against the Moran Towing & Transportation Company for alleged damage to the "Caloria" to the extent of approximately Thirty Thousand Dollars ($30,000.00).

The claim of the United States exceeds the "Caloria's" original claim, is a serious one and, we respectfully submit, should not have been treated simply as an adjunct to the "San Benito's" claim, to be disposed of on the same basis. In order to determine the liability of Moran Towing & Transportation Company to the United States, it is absolutely requisite, and we reiterate, absolutely requisite—that there be a determination of fault as between the "Margot Moran" and the "Caloria". Such a determination has not been made. The District Judge condemned the flotilla consisting of the "Margot Moran", the "Caloria" and the "Ernest F. Ladd" for "flotilla" fault. Repeatedly in his findings of fact and conclusions of law, the District Judge refers to fault of the "flotilla"—not to any fault of the individual vessels which constituted the flotilla.

As we read the findings of fact and the conclusions

of law of the District Judge, he never undertook to determine liability as between the "Margot Moran" and the "Caloria". For example, the District Judge remarked in his "Conclusions of Law" (R. 558):

> "The failure of the 'Margot Moran' and of the 'Caloria,' which was directing her own immediate movements, to discharge their combined duty to get the 'Caloria' over on the eastern side of the channel before passing the oncoming 'San Benito', places upon the 'Margot Moran' and the Moran Towing and Transportation Co., Inc., and upon the United States of America, as owner of the 'Caloria' an equal responsibility for that half of the damages for which the flotilla is liable."

That is, in effect, a "lump" finding of fault of the "Margot Moran" and the "Caloria" with respect to the "San Benito", without any attempt to segregate the fault as between the "Caloria" and the "Margot Moran".

Further in his findings of fact the District Judge remarked (R. 550):

> "The 'Moran' and the 'Ladd' were unable prior to the collision to straighten the course of the 'Caloria' and pull her away from the center or western side of the channel."

That is a "lump" finding of fault of the "Margot Moran" and the "Ernest F. Ladd", without any allocation of fault between them and without taking into account that it was the duty of the "Ernest F. Ladd", not the "Margot Moran", to steer the "Caloria"—and yet the "Ernest F. Ladd" has been exonerated.

None of the findings of the District Judge attribute any negligence to the "Margot Moran", nevertheless the Circuit Court of Appeals, on the question of liability, has affirmed on the findings of the District Judge. This

is patently an error, for not only is such a finding of negligence necessary to establish liability of Moran Towing & Transportation Company to the United States, but further the United States carries the burden of proof of showing such negligence. Such is the jurisprudence of the Supreme Court of the United States and the prior jurisprudence of the United States Court of Appeals for the Fifth Circuit.

In *Stevens v. The White City*, 285 U.S. 195, the Supreme Court of the United States held that an ordinary towage contract does not create a bailment, but surrenders to the tug only such control over the tow as is necessary for the performance of the tug's engagement (p. 200); that this is so even where the owner of the tow has no one on board her (p. 201); that a suit by the owner of a tow against her tug to recover for injury to the tow caused by negligence on the part of the tug is a suit *ex delicto* and not *ex contractu* (p. 201); that the tug is not liable as an insurer or as a common carrier, but its duties are to exercise such reasonable care and marine skill as prudent navigators exercise for the performance of similar services; and that in a suit against the tug for injury to the tow, the burden is upon the tow's owner to show that the injury was caused by a breach of that duty, so that the mere fact that a tow was in good order when received by the tug and in a damaged condition when delivered by the tug does not raise any presumption of negligence against the tug (R. 201).

The Court of Appeals for the Fifth Circuit adopted and applied these principles in the case of *New Orleans Coal & Bisso Towboat Company v. United States*, (5 C.C.A.) 86 F. 2d 53; (certiorari denied 300 U.S. 676).

In that case the Government brought suit against the tug owner for the loss of a barge which sank while in tow of the tug, and denying recovery the Court said:

> "A suit to recover damages for loss of the tow in an action *ex delicto* and the burden is on the claimants to prove the negligence of the tug. A presumption of negligence does not arise merely from a showing that the tow has been damaged. *Stevens v. The White City*, 285 U.S. 195, 52 S. Ct. 347, 76 L. Ed. 699; *The Ashwaubemie* (C.C.A.) 3 F. 2d 782".

Again, in *The Lapwing* (5 C.C.A.) 150 F. 2d 214, the Court cited with approval *Stevens v. The White City* and *New Orleans Coal & Bisso Towboat Company v. United States, supra*, and held a tower not liable for damage which a tow sustained during towage. In the opinion, the Court stated the question which must be answered in every suit based on a cause of action for negligent towage (150 F. 2d 215):

> "The appeal presents the question: Was the sinking caused by the negligence, unskillfullness and inattention to duty of the officers and crew of the Tug 'Lapwing'?"

If that question be propounded in this case, then we ask what was the negligence, unskillfulness and inattention to duty of the officers and crew of the Tug "Margot Moran"? There wasn't any. Captain Bijelich, the master of the "Caloria", answered that question when he testified (T. 310) that there was nothing the "Margot Moran" could have done to have avoided the collision. Even in the absence of such positive testimony the United States did not carry the burden of proof and is not entitled to recover from Moran Towing & Transportation Company, Inc.

It is submitted that the holding of the Court of Appeals constitutes a departure from the rule established by its prior jurisprudence and is directly in conflict with the jurisprudence of the Supreme Court of the United States and for that reason should be reversed.

It is respectfully submitted that a writ of certiorari should be granted; that the decision of the Court of Appeals should be reversed; and petitioner absolved of any fault or responsibility in the premises.

/s/ SELIM B. LEMLE
Counsel for Petitioner.

New Orleans, Louisiana
APRIL 28, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 740

MORAN TOWING & TRANSPORTATION CO., INC.,
PETITIONER

v.

EMPRESA HONDURENA DE VAPORES, ETC., UNITED STATES OF AMERICA, AND MOBILE TOWING AND WRECKING CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings and conclusions of the District Court for the Southern District of Alabama (R. 545-558) are not reported. The opinion of the Court of Appeals for the Fifth Circuit (R. 594-600) is reported at 194 F. 2d 629.

JURISDICTION

The judgment of the Court of Appeals (R. 601) was entered on February 21, 1952. A petition for

rehearing, filed on March 11, 1952 (R. 602), was denied on April 1, 1952 (R. 606). The petition for a writ of certiorari was filed on April 29, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in adopting the findings of the District Court that, in the circumstances of this case, a collision between two ships, one of which was in tow of petitioner's tug, was caused by the concurrent negligence of all three vessels.

STATEMENT

This case arose out of a collision between the S.S. *Caloria,* a public vessel owned and operated by the United States, and the S.S. *San Benito,* operated by respondent Empresa Hondurena de Vapores, in the channel of Mobile Bay. The *Caloria* was a "dead ship" with locked steering gear and manned only by a "riding crew" (R. 556). She was being towed by petitioner's tug *Margot Moran* with respondent Mobile Towing and Wrecking Company's tug *Ernest F. Ladd* lashed to her after starboard quarter to steer her (R. 545, 548-549).

The *San Benito* was proceeding southward down the channel from Mobile toward the sea. Petitioner's tug *Margot Moran,* with the *Caloria* in tow, was proceeding northward up the channel (R. 547-548). The *San Benito* and petitioner's tug sighted

each other and agreed to a port-to-port passing. The *San Benito* passed the *Moran* safely but collided with the *Caloria.*

Libels, cross-libels, and impleading petitions under Admiralty Rule 56[1] brought the operators of all the vessels before the District Court as adversary to each other (R. 545-546, 10, 26, 53, 57, 81). Upon a trial, some oral testimony (R. 123-133, 140-170) and much evidence in deposition form were taken (R. 171-544). The District Court, upon conflicting evidence (R. 547), proceeded to determine liability as follows: it first absolved the steering tug *Ladd* from all liability on the ground that the *Ladd* was under orders of the *Caloria* and carried out these orders without negligence (R. 557). Next, it determined that, as between the flotilla of tugs and tow and the *San Benito,* both were at fault in "that neither the flotilla nor the 'San Benito' began their efforts to effect a safe clearance in sufficient time before they met" (R. 555). Finally, it concluded, in allocating the flotilla's fault between petitioner's tug and the *Caloria,* that both were negligent (R. 558). It divided the damages equally between the *San Benito* and the flotilla,

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[1] "In any suit, whether in rem or in personam, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. * * *"

and divided the flotilla's share equally between the *Moran* and the *Caloria*.

On appeal by all three aggrieved parties, the Court of Appeals, modifying the judgment to apportion the damages one-third each to the three negligent vessels,[2] affirmed. It concluded that, since the evidence was in conflict and the district judge had broad experience, including personal knowledge of the waters where the collision occurred, it should accept his findings (R. 600).

ARGUMENT

Reduced to essentials, petitioner's challenge to the judgment below amounts to an attack on the concurrent determination of negligence by the two courts below and, as such, must be unsuccessful in admiralty as it would be in a civil action. See *Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96, 98-99, and cases cited. The ultimate issue sought to be raised is whether petitioner's tug was negligent. We think that the court below committed no error in adopting the District Court's finding that it was. And that finding, sustained by the record, presents no occasion for further review by this Court.

1. Petitioner's contention that the court below should not have adopted the District Court's findings is unfounded. No rule of law requires the Courts of Appeals to deny weight to a district

[2] *The Eugene F. Moran*, 212 U.S. 466. No issue is presented here as to the propriety of the modification.

court's findings in admiralty, any more than in civil actions. On the contrary, it is settled that, at least where the findings are based upon the trial judge's evaluation of oral testimony, they may not be set aside unless clearly erroneous (see, *e.g.*, L. Hand, J. in *Petterson Lighterage & T. Corp.* v. *New York C.R. Co.*, 126 F. 2d 992 (C.A. 2), and cases cited); and if the Courts of Appeals may in proper circumstances refuse weight to findings based on evidence in deposition form (but see, *e.g.*, *Maryland for use of Johnson* v. *United States*, 165 F. 2d 911, 914 (C.A. 4); *Rathbun* v. *Halvorson*, 181 F. 2d 57, 58 (C.A. 5)), there is certainly no rule which requires them to do so when the findings are adequately supported by the record. The appellate court may, of course, adopt the district court's view of the evidence.

There is no basis for the suggestion (Pet. 4) that the court below adopted the trial judge's findings "although apparently not concurring" in them. The Court of Appeals did observe (R. 600) that "the record presents a picture of conflicts which make it difficult to draw from it the true picture of what occurred." It concluded, however, not that the District Court's resolution of these conflicts was unreliable, but that the trial judge's findings and conclusions, showing "a profound and careful study of the record and a thorough and complete mastery of it," plainly warranted affirmance.

2. Petitioner contends (Pet. 5) that the attribution of negligence to the *Moran* was erroneous because it had made a safe passing before the collision with its tow occurred, arguing that in such circumstances the tug may not be held liable "because of the tow's failure to steer in the wake of the tug * * *." This argument would be pertinent if the negligence of the flotilla had consisted, as petitioner alleges (Pet. 2, 8), in the *Caloria's* failure to steer in the wake of the tug. The District Court found, however, that tug and tow were both negligent in failing "to discharge their combined duty to get the 'Caloria' over on the eastern side of the channel before passing" (R. 558, 555, 556).

This finding makes it clear that the tug was partly at fault. It supplied the motive power, and only it was capable of beginning an earlier move to starboard, which the judge found was required. He found, moreover, that the slackening of the hawser of a "light" ship, riding high in the water, which was caused by the tug's action in reducing speed (see R. 549), increased the inability of the *Caloria* to steer to the eastward (R. 556). Thus petitioner's vessel was chiefly, or at least partly, at fault in the negligent navigation of the flotilla, and there is no conflict with cases exonerating the tug where the fault is solely the failure of the tow to steer in the tug's wake and where, unlike the present case, the tug itself has not been negligent.

3. For the same reason there is no conflict with *Stevens* v. *The White City,* 285 U.S. 195. The tug

is here being charged, not with liability as a bailee of the *Caloria,* but with her own negligence toward both her own tow and the *San Benito* in failing to begin clearing soon enough.

CONCLUSION

The petition presents only an attack on concurrent findings of negligence. There is no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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